The American Bottling Company, Inc. d/b/a Dr. Pepper Snapple Group *and* Teamsters Local Union No. 293 a/w The International Brotherhood of Teamsters and Teamsters Local Union No. 348 a/w The International Brotherhood of Teamsters (Party to the Contract) and Teamsters Local Union No. 1164 a/w The International Brotherhood of Teamsters (Party in Interest). Case 8–CA–39327

December 29, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On August 12, 2011, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision, which was corrected by an erratum dated September 13, 2011. The Acting General Counsel and the Intervenor, Teamsters Union Local 348, filed exceptions and supporting briefs. The Acting General Counsel and the Charging Party, Teamsters Union Local 293, filed answering briefs to the Intervenor's exceptions, and the Intervenor and the Respondent filed answering briefs to the Acting General Counsel's exceptions. The Intervenor filed a reply brief responding to the Acting General Counsel's and the Charging Party's answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that the Respondent, The American Bottling Company, Inc. d/b/a Dr. Pepper Snapple Group, Twinsburg, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified by substituting the following for paragraph 2(e) and relettering the subsequent paragraph.

"(e) Within 14 days after service by the Region, duplicate and mail copies of the attached notice marked "Appendix," at its own expense, to all merchandiser employees who were employed by the Respondent at any time since January 14, 2011. Copies of the notice signed by the Respondent's authorized representative shall be mailed to the last known address of each of these employees."

Dated, Washington, D.C. December 29, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Sharlee Cendrosky, Esq. and *Iva Y. Choe, Esq.,* for the General Counsel.

Robert J. Bartel, Esq. and *Timothy C. Kamin, Esq. (Krukowski & Costello),* for the Respondent.

Timothy R. Fadel, Esq. (Wuliger, Fadel & Beyer), for the Charging Party.

James F. Wallington, Esq. (Baptiste & Wilder, P.C.), for the Party to the Contract.

[1] No exceptions were filed to the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(1) by threatening unit employees at its Maple Heights facility that the Twinsburg facility would be "opening nonunion."

The Acting General Counsel excepts to the judge's failure to order that the notice be mailed to merchandiser employees. The judge noted in fn. 28 of his decision that "it might reasonably be argued that the notice should be . . . mailed to the merchandisers" based on record evidence that they spend 95 percent of their worktime away from the Respondent's facility. He declined to impose this remedy, however, because no party had requested it.

For the reasons cited by the judge, and as argued by the Acting General Counsel on exception, we find this remedy appropriate and shall modify the judge's Order to require it. Although the Acting General Counsel did not make this remedial request to the judge, his failure to do so does not preclude the Board from imposing this remedy. See, e.g., *Schnadig Corp.*, 265 NLRB 147 (1982).

Subsequent to the judge's decision, the U.S. District Court for the Northern District of Ohio granted the Acting General Counsel's petition for a 10(j) injunction ordering the Respondent to withdraw and withhold recognition from the Intervenor as the bargaining representative of employees at its Twinsburg facility, and to cease deducting dues from employees on the Intervenor's behalf. *Calatrello v. American Bottling Co.,* No. 5:11CV992 (N.D. Ohio 2011). In light of this injunctive relief, we find it unnecessary to consider the Acting General Counsel's additional remedial requests that the notice be read to employees and that access to the Twinsburg facility be granted to the Charging Party Union, Teamsters 293, and Teamsters Local 1164. Member Hayes would not in any event grant the request for extraordinary remedies, for the reasons stated by the judge.

DECISION*

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. In late 2010, Dr. Pepper Snapple Group (the Respondent) decided to close its two outdated Northeast Ohio facilities in Akron and Maple Heights and relocate to a new facility 15–20 miles away in Twinsburg. The complaint alleges that it thereafter committed a number of unfair labor practices related to this move in violation of Section 8(a)(1), (2), and/or (3) of the Act. Specifically, the General Counsel alleges that it unlawfully threatened the bargaining unit employees at Maple Heights (who were represented by Teamsters Locals 293 and 1164), that the Twinsburg facility would be opening nonunion; subsequently recognized and signed a contract with Teamsters Local 348 (which represented the unit employees at Akron) as the exclusive representative of a consolidated unit at Twinsburg without evidence that Local 348 had majority support; gave access to Local 348 to solicit authorization cards from the employees in the consolidated unit; and deducted dues from the employees pursuant to the union security clause in the Local 348 contract.[1]

The Respondent denies that it violated the Act in any respect. Although it admits that it executed a contract with Local 348 effective by its terms January 14, 2011, the day it was signed, the Respondent contends that the contract was only a tentative agreement that was conditioned on Local 348 obtaining majority support in the consolidated unit, which it did several days later.

Local 348 likewise contends that the Respondent acted lawfully, but for different reasons. Specifically, Local 348 contends that the Respondent was legally obligated under both the Act and the terms of the Akron contract to unconditionally recognize and bargain with it as representative of the consolidated unit at Twinsburg—i.e., even without evidence that a majority of the employees in the consolidated unit had signed Local 348 authorization cards—and that the Respondent in fact did so.

Following two prehearing conferences, the case was tried before me on June 20–22, 2011, in Cleveland, Ohio. Thereafter, on July 27, the General Counsel, the Charging Party (Local 293), the Respondent, and the Party to the Contract (Local 348) filed posthearing briefs.[2] After considering the briefs and the entire record,[3] for the reasons set forth below, I find that, with the exception of the alleged 8(a)(1) threat, the Respondent violated the Act as alleged.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation that operates sales and beverage distribution facilities in Ohio and elsewhere throughout the U.S. The Respondent admits, and I find, that it annually derives gross revenues over $1 million and purchases and receives goods valued over $50,000 directly from outside Ohio, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits, and I find, that Teamsters Locals 293, 348, and 1164 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As indicated above, the present controversy arose as a result of the Respondent's decision in late 2010 to close its two facilities in Akron and Maple Heights and consolidate its operations and employees at those facilities into a new facility in Twinsburg. The decision created a problem because, not only were many of the employees represented, they were represented by three different Teamsters locals. Employees at Akron (delivery drivers, warehousemen, vending, mechanics, and merchandisers) were represented by Local 348, whereas employees at Maple Heights were represented by either Local 293 (delivery drivers, helpers, and advance sales representatives) or Local 1164 (warehouse and forklift operators). (GC Exhs. 3, 17, 47.)

Moreover, certain employee classifications that were included in the unit at Akron were not included in either of the units at Maple Heights, and vice versa. For example, merchandisers and mechanics were included in the Akron unit, but were unrepresented at Maple Heights. And sales/account managers and transport drivers were represented by Local 293 at Maple Heights, but were excluded from the unit at Akron.[4] The following chart identifies the number of employees at each location by classification and representation that would be relocated to Twinsburg:[5]

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* Correction has been made according to an errata issued on September 13, 2011.

[1] The underlying charge was filed by Local 293 on February 2, and amended on March 30, 2011. The complaint issued the following day, on March 31.

[2] Although listed as a party in interest, Local 1164 did not formally appear at the hearing.

[3] Unless otherwise stated, cited evidence has been credited, to the extent supportive, and contrary evidence discredited. In evaluating witness credibility, all relevant and appropriate factors have been considered, including, not only the demeanor of the witnesses, but their apparent interests, if any, in the proceeding, whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts, "inherent probabilities, 'and reasonable inferences which may be drawn from the record as a whole'" (*Daikichi Corp*., 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003) (unpub.), quoting *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)).

[4] A preponderance of the credible evidence indicates that "advance sales representatives" and "account managers" are essentially the same position, i.e. the advance sales representatives at Maple Heights performed the same or similar functions as the account managers at Akron. See Tr. 52, 343, 380, 436, 561–562, and 603–604. Indeed, the Respondent has used the terms interchangeably. See, e.g., GC Exh. 4, attachment B. Thus, to avoid confusion, I have referred to them throughout this decision as "sales/account managers."

[5] See GC Exhs. 4, 18, 35, 39, and 40; and Int. Exh. 8. There is conflicting evidence in the record regarding the precise numbers of employees who transferred. For example, there is testimony that only 24 Akron merchandisers transferred (Tr. 276), but General Counsel Exhibits 35 and 39 indicate that a 25th merchandiser (Dorsey) was hired at Akron on January 6, 2011, shortly before the move, and also transferred to Twinsburg. Similarly, there is testimony that 15 members of

Akron	**Maple Heights**	
Local 348	*Local 293*	*Local 1164*
25 merchandisers	28 drivers	13 warehouse workers
17 drivers	22 sales/account managers	1 custodian
10 warehouse workers	5 transport drivers	(14 TOTAL)
3 vending employees	4 helpers/vending employees	
2 mechanics	(59 TOTAL)	
(57 TOTAL)		
Unrepresented	*Unrepresented*	
12 sales/account managers	35 merchandisers	
2 transport drivers	2 mechanics	

Thus, there were obviously some significant labor relations issues for the Respondent to deal with as a result of its decision. The Respondent began by making a series of telephone calls to the three locals. Initially, on September 22, 2010, the Respondent called to give the locals advance notice of the scheduled January 2011 move. Later, on September 28, the Respondent called to advise that it wanted to have only one contract with one local at the new facility. The Respondent therefore requested that the locals determine which of them would have jurisdiction. (Tr. 55–56, 100–101, 175, 237, 294–296, 635.)

Over a month passed without the Respondent receiving a response. Accordingly, the Respondent requested a joint meeting with the three locals. The meeting was held on November 16 at the Maple Heights facility. Representatives of all three locals attended. The Respondent began by presenting a prepared list of "talking points" regarding the move. As it had previously,[6] the Respondent assured the locals that virtually all unit employees would be transferred, and that they would continue performing mostly the same functions. As for "union representation and bargaining issues," the Respondent advised that:

- By our count, none of the three local unions currently represents a majority of the anticipated workforce at Twinsburg.
- It would be illegal to grant recognition to any one representative under the circumstances.
- We are not interested in maintaining [three] agreements with [three] locals.
- One option would be to deal with the problem by opening the new facility 'non-union' and then resolving the issue through competition, organizing campaigns, authorization card drives and maybe even a three-way NLRB election[], and so on.
- We aren't sure that makes much sense either.

The Respondent therefore proposed a "mutual agreement between all parties as to representative status" and "which local represents the workforce." The Respondent noted that the "other locals may disclaim interest," and that there could be a "card check process if necessary to establish majority support—our lawyers can help us figure this out."

The Respondent also advised the locals what contract "terms we would prefer if we can get an agreement in advance" for the Twinsburg facility. With respect to wages and benefits, the Respondent proposed terms "essentially mirroring the Akron contract." As for the scope of the unit, the Respondent proposed including all drivers, warehouse workers, and merchandisers (even the unrepresented merchandisers at Maple Heights), but excluding all sales/account managers (even those represented by Local 293 at Maple Heights), which the Respondent viewed as "more of a management-side function."

However, the Respondent advised that "if we cannot agree on terms, we would have no alternative but to open without recognizing any representative as the majority representative and then allowing the process to run its course."

Both Local 293 and Local 348 briefly responded to the Respondent's presentation. Local 293 objected to excluding the Maple Heights sales/account managers from the proposed unit, and to otherwise "mirroring" the Akron contract.[7] Local 348 objected to the Respondent's proposed "non-union" alternative on the ground that the "transfer of company title or interest" clause in its Akron contract prohibited the company from opening the Twinsburg facility nonunion.[8] However, there was little further discussion of the Respondent's proposals. The Respondent did not respond to the Locals' objections beyond what was stated in its "talking points." Nor did any of the locals disclaim interest at that time. Rather, they advised the Respondent that

Local 1164 transferred (Tr. 174, 183, 213), but General Counsel Exhibits 35 and 40 indicate that only 14 transferred because one of them (Mingas) was terminated on November 24, 2010. And General Counsel Exhibit 35, which otherwise appears accurate, includes a former Maple Heights driver (Wojciechowski) who, according to General Counsel Exhibit 39, was terminated on January 14, 2011, the Friday before Twinsburg opened for business. Unfortunately, there are several other examples as well. While I have attempted to resolve all the discrepancies in creating the chart, the discrepancies are small and would not effect the ultimate result.

[6] See the Respondent's November 3 and 4 letters to all three locals attaching copies of the WARN Act notices to the Akron and Maple Heights employees (GC Exhs. 4, 18; Int. Exhs. 7, 8).

[7] The Respondent had previously proposed trading the Maple Heights merchandisers for the sales/account managers in the 2005 and 2008 contract negotiations with Local 293. However, Local 293 had rejected the proposed tradeoff in both instances (even though the net result would have been a substantial increase in Local 293's total membership), on the ground that the union would not "trade people like they are cattle." (Tr. 59, 120–122.)

[8] See GC Exh. 47, art. XIV:

> This agreement shall be binding upon the parties hereto, their successors, executors and assigns. In the event an entire operation, or portion thereof, or rights only, are sold, leased, transferred or taken over by an outside third party, by sale, transfer, lease, assignment, receivership or bankruptcy proceedings, such operation or use of such right shall continue to be subject to the terms and conditions of this Agreement, for the life thereof. Whenever an operation is closed and the work is transferred to or absorbed by another unionized operation, the affected employees will be entitled to follow their work and their seniority shall be dovetailed at the new operations. Disagreements between Unions shall be resolved through the Union's mechanism and in accordance with the International Constitution . . . .

they would meet privately before providing a formal response. (GC Exh. 5; Tr. 57–59, 123, 126, 176–178, 238, 297, 422–429, 519, 605, 639–641.)

The locals thereafter were unable initially to agree among themselves which would represent the employees at the new facility. Accordingly, on November 18, Local 293 filed a request with the Teamsters Joint Council for a hearing to help resolve the "jurisdictional dispute." (GC Exh. 11.) Local 1164 separately filed a similar request. (See, e.g., Tr. 187.)

However, a few weeks later, on December 1, representatives of the two larger locals, 348 and 293, met privately and mapped out a proposal setting forth the conditions under which Local 348 would be the sole representative at Twinsburg (Tr. 124, 641–643, 647–648). Local 348 then set up another meeting with the Respondent to present this proposal.

The meeting was held on December 13 at the Local 348 union hall in Akron. Local 293 drafted and presented the proposal on behalf of all three locals.[9] Entitled "Union Proposals for the joining of [the three locals] into one Collective Bargaining Agreement," it proposed modifying the recognition clause of the Local 348 contract to include sales/account managers, transport drivers, and helpers. It further proposed that the Maple Heights sales/account managers, transport drivers, and vending employees would continue to be members of Local 293, but would be represented by Local 348 in all contract matters. Finally, it proposed certain modifications to the substantive terms of the Local 348 contract, including substituting the Local 293 Health & Welfare Fund. The Respondent, however, reiterated that it would not voluntarily agree to include the sales/account managers in the Twinsburg unit. Accordingly, no agreement was reached. (GC Exh. 6; Tr. 61, 65–66, 141–143, 241, 371, 432–434, 523, 605, 643–644.)

Thereafter, on December 24, "in the interest of getting the process moving," the Respondent sent a complete proposed "Agreement" to Local 348. As described in the Respondent's cover letter, the proposed agreement was essentially the "current [Local 348] contract with minimal changes." Among other things, it included two alternatives with respect to health insurance: the former Local 293 and 1164 unit employees would continue to participate in the Local 293 Health & Welfare Fund, or all employees would participate in the company insurance plan.[10] Most significant, however, was what it did not change: the sales/account managers continued to be excluded from the unit. (GC Exh. 7; Tr. 247–249, 373.)

[9] Local 293's principal officer (Zemla) gave inconsistent testimony about whether Local 1164 had joined in this proposal. See Tr. 61, 65, and 107. However, the weight of the evidence indicates that the proposal was, in fact, made on behalf of all three locals. Thus, although no representative of Local 1164 was present at the December 1 and 13 meetings (or at subsequent meetings), Local 1164's principal officer (Paro) testified that Zemla had "taken the lead in negotiation"; that he and Zemla "were in contact all the time"; and that he had agreed with Zemla to let Local 348 represent Local 1164's members at Twinsburg if the recognition, wage, and benefit provisions of Local 1164's contract at Maple Heights were honored and maintained, Tr. 188–189, 195.

[10] The Respondent proposed alternative insurance plans because it was unclear at that point whether the Local 293 Health & Welfare Fund would agree to cover the employees at Twinsburg.

Several days later, the Respondent also distributed a memorandum directly to all of the Akron and Maple Heights employees regarding the move. The memo, which was dated December 28 and signed by Respondent's area director (Tecca), advised the employees that the Twinsburg facility would likely be ready for occupancy by the original January 3 "consolidation date." The memo continued:

> The discussions with the Unions, however, have not progressed at the same pace and it does not appear that we will have a working contract in place to begin selling and delivering on Monday, January 3rd. Due to this situation, we will continue to function as separate operations as we continue to negotiate. I realize the stress and uncertainty this causes you and your families and I am as anxious as you are to move ahead. I will keep you informed regarding a revised date which I fully expect to be in January. [GC Exh. 41; Tr. 254–256, 308–309.]

The parties met again a few days later, on December 30. The meeting was again arranged by Local 348 and held at its union hall. Prior to the start of the meeting, Local 348 shared the Respondent's December 24 proposal with Local 293, which had not previously seen it. The two locals then sat down with the Respondent to discuss the matter. Although there was some discussion of the Respondent's proposed changes, the primary focus was on the status of the sales/account managers. Various options were mentioned. Local 293 suggested that a separate vote could be held among the union and nonunion sales/account managers. The locals also proposed including only the currently represented Maple Heights sales/account managers in the Twinsburg unit. However, the Respondent rejected this, and repeated that it would open nonunion if the locals continued to press for including any of the sales/account managers. Accordingly, little progress was made, and the meeting again ended without agreement. (Tr. 67–68, 127, 249–250, 371, 435, 438–440, 576, 606, 656–657.)

In the meantime, there was also no resolution of the "jurisdictional dispute" that had been filed by Locals 293 and 1164 with the Joint Council. Although there was an informal understanding among the three locals that Local 348 would be the sole contract representative at Twinsburg under the terms of their December 13 proposal, no effort had been made to formally withdraw the "jurisdictional dispute." Accordingly, after the December 30 meeting, Local 348 requested Local 293 to do so, as it was clear that the Respondent would only voluntarily agree to recognize and bargain with one local at Twinsburg. Local 348 assured Local 293 that, if it withdrew its request from the Joint Council, Local 348 would continue to "fight the fight" to get all of the Maple Heights unit employees covered, including the sales/account managers, and to maintain their current wages and benefits.

Based on these assurances, on January 6, 2011, Locals 293 and 1164 sent identical letters to the Joint Council advising that they were "dropping the jurisdictional claim on the Twinsburg location." The letters specifically stated that the locals were doing so in light of "an understanding and commitments" reached with Local 348 regarding "wages, health care, guarantees, and recognition," and to prevent the Respondent from

opening "non-union" and "enable our members to be protected when the move occurs." (GC Exh. 12; R. Exh. 1; Tr. 81, 135–136, 187–189, 658, 721–723.)

The next day, January 7, the Respondent distributed a memo to all "union-affiliated employees" at Akron and Maple Heights advising that the Twinsburg facility would begin operating on Monday, January 17. It also advised that, "except for a limited number of [Maple Heights] sales positions," their wages would "closely mirror" their current wages and they would be offered an insurance plan identical to the Akron plan. Finally, it advised that meetings would be held over the next few days to ensure that the employees experienced a "seamless transition." (GC Exh. 42; Tr. 256–257.)

The meetings with employees were held the following week, on January 11 and 12. The record is unclear what exactly was said at the January 12 meeting, which was held with the merchandisers. However, Tecca, the Respondent's area director, admitted that, at the January 11 meeting with all of the other Maple Heights employees, he or the Respondent's regional HR and labor relations director (Karla), told the employees that the facility would be "opening nonunion." Tecca testified that

> [b]asically . . . we told the employees that, again, we were not here to blame anybody for not being able to get, you know, a collective-bargaining agreement in place for Twinsburg, and that it looked like we would be—the labor force would be unrepresented as we moved into Twinsburg. So we were preparing them for the fact that on Monday, for all intents and purposes, we would not have a labor contract in play.

(GC Exh. 45; Tr. 257, 260–262, 587.)

The parties also again met on January 12. As before, the meeting was scheduled by Local 348 at its union hall. Representatives of Local 293 also again attended, as well as a representative from the International Union, whom Local 348 had brought in for support. The unions continued to press the Respondent to voluntarily recognize the sales/account managers as part of the unit. The Respondent, however, maintained its position that it would not do so, and repeated that it would open the facility nonunion if the unions did not change their position. Accordingly, after a caucus, Local 293 advised the Respondent that it would hold a union meeting that evening to determine whether the Maple Heights sales/account managers wanted out; if they did, Local 293 would not challenge their exclusion from the Twinsburg unit. (Tr. 71–73, 108, 252–253, 306–307, 444–445, 576, 659–662, 698–699.)

The sales/account managers, however, made clear at the union meeting that they did not want out. According to the uncontroverted testimony of Local 293's principal officer (Zemla), the 16 sales/account managers who attended "all agreed overwhelmingly that they wished to continue to be represented." The drivers who attended the meeting also indicated that they did not want to be represented by any other local. Accordingly, Local 293 informed Local 348 later that evening that it was "going to continue to represent our people and . . . do what we have to legally." Local 293 also informed the Respondent of this by telephone the next morning, on January 13. (Tr. 74, 110, 133.)

Early the following day, at 7:14 a.m. on January 14, Local 293 also faxed a letter to the Respondent notifying it of the union's position. Specifically, the letter asserted that "under the existing contract and the National Labor Relations Act, Dr. Pepper Snapple must continue to recognize [Local 293] as the collective bargaining representative for [the employees it represented at Maple Heights, including the sales employees] and honor the contract." The letter further advised that Local 293 intended to immediately file an unfair labor practice charge over the Respondent's failure to recognize it as their representative at the new facility. (GC Exh. 50; Tr. 75, 98, 115–118, 136.)[11]

In the meantime, on January 13, Local 348 also held a meeting with its members. Local 348 explained to them what was going on, and that it appeared the Respondent was going to be opening nonunion on the 17th. According to Local 348's president (Ziga), the discussion then became heated, with older members in particular expressing concern about working nonunion. Ultimately, the members unanimously directed the union to "go back and get us a contract" to prevent this from happening. Local 348 therefore immediately requested another meeting with the Respondent the following morning, and the Respondent agreed. (Tr. 262, 577–578, 664–665, 727, 732.)

The January 14 meeting was again held at the Local 348 union hall. However, unlike the prior meetings, only representatives of Local 348 attended; neither Local 283 nor Local 1164 were notified or invited to the meeting. Thus, the discussion initially focused on whether Local 348 had the authority or jurisdiction to negotiate a contract covering the former Local 293 and 1164 unit employees. The Respondent's representatives were aware of the Local 293 and 1164 letters to the Joint Council on January 6 withdrawing their jurisdictional claims; however, they had never been directly advised that the locals were disclaiming interest in representing any of the employees at Twinsburg. Further, they had not yet seen the letter that Local 293 had faxed to their office earlier that morning demanding continued recognition and bargaining.

Local 348 assured the Respondent that it did have the authority, and handed out a copy of Local 293's January 6 letter to the Joint Council. Local 348 also advised the Respondent, for the first time, that it would agree to exclude the sales/account managers from the unit in order to reach a contract. Accordingly, the parties proceeded to negotiate over the terms of the agreement.

Eventually, near the end of the day, the parties agreed to all terms, including the effective dates of the contract (January 14, 2011 through May 31, 2012), which union would be the exclusive representative (Local 348), the unit description ("all delivery drivers, warehousemen, vending, mechanics, merchandisers, equipment move operators, service technicians, transport drivers and seasonal employees working directly out of the Twinsburg, Ohio facility"—i.e., all of the employees in the chart set forth above except the former Akron and Maple Heights sales/account managers), and the substantive provi-

[11] Local 293 did, in fact, file an unfair labor practice charge that day, as did Local 1164. GC Exh. 52.

sions. (GC Exh. 25.) Accordingly, Local 348 signed the agreement.

However, the Respondent at that point repeated its position, which it had expressed at prior meetings, that Local 348 needed to show proof that it represented a majority of the contractual unit.[12] The Respondent even gave the union a draft "Memorandum of Understanding" (MOU) addressing the issue. The MOU, which included signature lines for all three locals, specifically stated, among other things, that the agreed upon contract terms were "contingent on Local 348's representing a majority of the new bargaining unit" (R. Exh. 2).

Local 348 refused to sign the MOU, and suggested that it was highly unlikely that the other locals would either. It repeated its position, which it had likewise expressed in prior meetings, that the Akron contract transferred to the Twinsburg facility under the "transfer of company title or interest" clause (see fn. 8, above). It also advised the Respondent that its membership wanted to get a contract "settled" and "in place" by the time the facility opened on Monday. It therefore pressed the Respondent to execute the contract without a prior showing that a majority of the employees in the unit had signed cards for Local 348.

Following a brief caucus and discussion with the Company attorney, the Respondent's representatives advised Local 348 that they would sign the contract, without the proposed MOU, but that the union would still need to show majority status. Each of the Respondent's three representatives (Tecca, Karla, and Bobal) then signed the contract. (Tr. 79, 104–105, 182, 262–263, 315–321, 342, 442, 448, 452, 458–459, 487–488, 499–501, 525–526, 531–532, 537–546, 578–580, 599, 611–616, 627, 665–674, 701–702, 707–709, 722–725, 733–734, 744.)

News of these events, of course, eventually reached Locals 293 and 1164. During the course of the January 14 meeting, around 11 or 11:30 a.m., Local 348 actually called Local 293 to let it know what was happening. Specifically, Local 348 advised that it was going to go ahead and negotiate a contract with the Respondent. In response, the same day Locals 293 and 1164 faxed letters to the Joint Council "refiling" their jurisdictional claims. The letters stated that the claims were being refiled because Local 348 was "no longer recognizing the agreement dated January 6, 2011" and "has been unable to accomplish the commitments that [it] had promised" to Locals 293 and 1164 (GC Exhs. 13, 21; Tr. 83, 192).[13]

Thereafter, on Monday, January 17, Local 293 also filed two grievances against the Respondent to enforce the rights of the sales/account managers under the Maple Heights contract (GC Exh. 8; Tr. 75, 137–139). In addition, on January 18 and 19, both locals filed unfair labor practice charges alleging that the Respondent had unlawfully recognized Local 348 at Twinsburg without evidence that it had majority support (GC Exh. 52).

In the meantime, the facility opened as scheduled on January 17. The day started early, at 6 a.m., with mandatory orientation meetings for all of the employees (except the merchandisers, who, as discussed below, would have their orientation meeting on the 19th). The meetings were divided into several groups, due to the limited size of the conference room. At the meeting for the drivers, Tecca began by introducing their new district manager and supervisors. He also reported that the Company had reached a contract with Local 348, and identified the Local's president and secretary/treasurer (Ziga and Darrow), who sat or stood in the back of the room.[14]

The district manager then gave the employees a tour of the facility. When they returned, two Local 348 stewards asked the district manager to leave, which he did. The stewards thereupon spoke to the group. They confirmed that the Company and Local 348 had negotiated a contract on Friday. They also stated that, if the former Local 293 drivers wanted to be in the union, the stewards had membership/dues-checkoff forms there for them to sign.[15] However, one of the Maple Heights drivers, who was a Local 293 steward, stood up and said there was no need to sign because they were already represented by Local 293. The Local 348 stewards said they understood, and the meeting ended. (Tr. 145–159, 163–166, 265–269, 328, 333, 585, 678–680.)

Two days later, on January 19, the Respondent held a similar, mandatory orientation meeting with the merchandisers. Consistent with past practice, a separate meeting was scheduled with the merchandisers because they work in the field and do not come into the facility as frequently as other employees. As at the meeting on the 17th, the Respondent began by introducing the merchandisers to their district managers and coordinators. The district managers were then dismissed, and Tecca turned the meeting over to Ziga and Darrow, who were again in attendance.[16] They explained that all the merchandisers were now under Local 348's contract and described the differences

[12] Tecca, the Respondent's area director, testified that he communicated this requirement "numerous times" during the January 14 meeting, Tr. 744. However, his testimony is inconsistent with the testimony of both Ziga, Local 348's president, Tr. 672, and Karla, the Respondent's regional HR and labor relations director, Tr. 525, and I therefore discredit it.

[13] There is no evidence that the Respondent was aware of these letters at the time it executed the agreement with Local 348.

[14] Tecca testified that he told the drivers that the Company had reached only a "tentative" agreement with Local 348, Tr. 266, 745. However, I discredit this testimony. First, it is uncorroborated. Second, it was contradicted by Ziga, who denied that Tecca used this word, Tr. 735. Third, it is unlikely that Tecca would have used the word under the circumstances, given the substantial risk that it would have engendered both confusion (there is no evidence that he explained to the drivers what "tentative" meant) and controversy (since Ziga and Darrow had previously made clear that Local 348 did not view the contract as tentative or conditional). Accordingly, I find that the Respondent did not tell the drivers that the contract with Local 348 was "tentative" or conditioned on proof of majority status.

[15] The membership application and checkoff authorization are contained on a single form, CP Exh. 1.

[16] Tecca testified that, as at the January 17th meeting with the drivers, he told the merchandisers that a "tentative" agreement had been reached with Local 348, Tr. 270, 745. However, I discredit this testimony as well, for essentially the same reasons. Although Ziga did not directly contradict Tecca's testimony, he testified that he was the one (rather than Tecca) who told the employees about the contract. As between the two, I find that Ziga was the more reliable witness overall, and I credit his testimony in this respect.

between their new and old employment terms.[17] They then passed out membership/dues-checkoff forms. Tecca (and the branch manager, who had begun the meeting) left a few minutes later. (Tr. 268–271, 334–335, 586–591, 622, 680–683, 736–737, 746.)

The meeting proved successful; 31 of the formerly unrepresented merchandisers signed membership/dues-checkoff forms, which Local 348 forwarded to the Respondent the following day, on January 20. (GC Exh. 34; Tr. 684.) After verifying the 31 signatures, and adding them to the 57 transferred employees who were already Local 348 members, the Respondent concluded that Local 348 had a majority (88 of 147) in the unit set forth in the January 14 contract (GC Exh. 35; Tr. 278–281, 482–487, 618).[18] Accordingly, on Monday of the following week, January 24, the Respondent notified Local 348 that, "consistent with our conditional agreements entered into on January 14, 2011 . . . [w]e now consider the terms of those agreements to be in effect" (GC Exh. 36). It also deducted Local 348 dues pursuant to the union security provisions of the January 14 contract and the employees' check-off authorizations (GC Exh. 25, art. II). (See GC Exhs. 26–30; Tr. 230.)[19]

A week later, on February 1, Local 293 filed the first of three representation or unit clarification petitions with the NLRB regarding the Twinsburg facility. On February 2, it also filed another unfair labor practice charge, which became the basis for the instant complaint (GC Exh. 1).[20]

[17] Tecca testified that he permitted the Akron merchandisers, who were already Local 348 members, to leave the room before turning the meeting over to Ziga. However, he acknowledged that he did not know whether any of them stayed. Tr. 270. Further, Ziga testified that at least some of them did stay, Tr. 683. Again, I credit Ziga. In any event, it is undisputed that the formerly unrepresented Maple Heights merchandisers remained in the room.

[18] As noted previously (fn. 5), the record indicates that the total number of employees in the recognized unit was actually 147, rather than 148 as indicated in GC Exh. 35.

[19] There is insufficient reliable evidence in the record to determine whether the Respondent applied the terms and conditions set forth in the January 14 contract to the employees during the first week of operation. Although the presidents of both Local 293 (Zemla) and 384 (Ziga) testified that the Respondent opened under the Local 348 contract, including the wage and guaranteed hours provisions, Tr. 75, 682, the basis for their knowledge was never adequately established. Indeed, Ziga admitted that he simply assumed this was true because none of the employees complained, Tr. 736. As for Respondent's officials, Tecca testified that he did not know what terms were applied the first week, Tr. 339, 624. And Karla, the regional HR and labor relations director, initially testified that "there were no contractual terms" on the 17th, but later acknowledged that he was not even at the Twinsburg facility prior to the 20th. Further, like Tecca, he appeared unable to say whether the contractual wages and benefits were implemented. Moreover, like Ziga, he testified that it was "reasonable to assume" that some of the negotiated terms, such as shift schedules, *were* imposed (although he said this would have been done solely for "business reasons" and not because the contract required it). Tr. 460, 513–514, 517–518. Finally, no personnel records were offered to substantiate or refute any of the foregoing testimony.

[20] In light of this new charge (which specifically alleged violations of Sec. 8(a)(1), (2), and (3)), the previous charges filed by Locals 293 and 1164 (which alleged similar violations, but under Sec. 8(a)(1) and (5)), were later withdrawn, GC Exh. 52. The initial representation and unit clarification petitions filed by Local 293 on February 1 and 16 were also withdrawn after the last representation petition was filed on February 24, GC Exh. 53. This last petition (Case 8–RC–17064), which was jointly filed by both Local 293 and Local 1164, seeks an election among all of the formerly represented and unrepresented employees listed in chart above who were transferred to Twinsburg, including the sales/account managers, GC Exh. 24. The petition is currently being held in abeyance pending the outcome of this proceeding, GC Br. 4. The jurisdictional dispute before the Teamsters Joint Council has also been stayed, GC Exh. 16. The two grievances previously filed by Local 293 on January 17 were denied by the Respondent, GC Exh. 8. The Respondent also denied the Union's subsequent request for arbitration, GC Exhs. 9, 10.

B. Analysis

1. The alleged 8(a)(1) threat to "open nonunion" on January 11

As indicated above, the first alleged violation is that the Respondent unlawfully threatened the Maple Heights unit employees on January 11 that the Twinsburg facility would be "opening nonunion." For the reasons set forth below, I find that this allegation is not supported by a preponderance of the evidence.

First, the General Counsel does not contend that the statement was unlawful because it was objectively false or legally incorrect. Compare *Eldorado, Inc.*, 335 NLRB 952 fn. 4 (2001) (finding 8(a)(1) violation where the successor employer's statement to employees that the new business would be "nonunion, but you could try to vote it in if you want" was not a legally correct statement), with *P. S. Elliott Services*, 300 NLRB 1160, 1162 (1990) (finding no 8(a)(1) violation where the employer's statement that it was a "nonunion company" was a truthful statement of objective fact). Although it remained possible, on January 11, that one of the locals could have obtained majority support by January 17, there is no evidence that any of them were making any effort to do so. Thus, at that point, as Tecca stated, it did in fact "look like" the facility would be "opening nonunion." Indeed, this is the crux of the General Counsel's other, meritorious 8(a)(2) and (3) allegations: that, although the Respondent advised the locals that majority status was required to recognize one of them at Twinsburg, it ultimately ignored its own advice and recognized Local 348 on January 14 without evidence of majority support in order to ensure a "seamless transition."

Second, there is no direct evidence to support the General Counsel's contention that the Respondent "intended" to coerce the employees in the exercise of their Section 7 rights, i.e. that it made the statement "in an attempt to frighten the employees to pressure their union to agree to its demands regarding the exclusion of the [sales/account managers] from any bargaining unit at the new facility" (Br. 21). In any event, as the General Counsel acknowledges, the Board applies an objective standard under 8(a)(1)—whether the statement would reasonably tend to interfere with the free exercise of employee Section 7 rights—and the employer's motive is irrelevant. *El Rancho Market*, 235 NLRB 468, 471 (1978), enfd. 603 F.2d 223 (9th Cir. 1979). See also *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 975 (D.C. Cir. 1998), cert. denied 119 S.Ct. 795 (1999); and

Torbitt & Castleman, Inc. v. NLRB, 123 F.3d 899, 906 (6th Cir. 1997).

Third, there is also insufficient evidence to support a finding that the statement was objectively coercive in context. In arguing to the contrary, the General Counsel cites the two memos the Respondent had previously sent to the employees on December 28 and January 7. However, the memos made no mention of the dispute over excluding the sales/account managers from the Twinsburg unit. Although the December 28 memo indicated that no contract had yet been reached, it did not say why no contract had been reached. Further, it indicated that the Respondent would delay the relocation from the original January 3rd date to allow the parties additional time to negotiate. Moreover, the January 7 memo assured all the nonsales/account managers that their wages at Twinsburg would "closely mirror" their current wages, and that they would continue to receive health insurance identical to the Akron plan.

As noted by the General Counsel, the Respondent again referenced the lack of a contract during its remarks on January 11. However, like in its previous memos, the Respondent made no mention of the dispute over the sales/account managers. Nor is there evidence that the employees otherwise knew about the dispute at that time; Locals 293 and 348 did not meet with their members to explain the situation until January 12 and 13. Further, the Respondent specifically stated that it was not going "to blame anybody" for failing to reach a contract.

Thus, even assuming, as suggested by the General Counsel, that it would have been unlawful for the Respondent to blame the Unions' refusal to exclude the sales/account managers from any unit at the new facility for its decision to open nonunion, the record fails to establish that it did so. Accordingly, in agreement with the Respondent, I find that the January 11 statement did not violate Section 8(a)(1) of the Act.

2. The alleged 8(a)(2) recognition of Local 348 on January 14

The second allegation is that the Respondent violated Section 8(a)(2) of the Act by recognizing Local 348 as the exclusive collective-bargaining representative at Twinsburg and executing a contract with it on January 14, without evidence that Local 348 had majority support in the recognized unit. As indicated above, both the Respondent and Local 348 dispute this allegation, but on different grounds. For the reasons set forth below, I find that neither of these grounds has merit, and that the Respondent violated the Act as alleged.

The Respondent's Position

The Respondent does not dispute that it executed the contract with Local 348 on January 14. The Respondent also does not dispute that Local 348 did not have majority status in the contractual unit at that time. Nor does the Respondent dispute that it could not lawfully recognize Local 348 at Twinsburg without evidence that it had majority support in the unit. See generally *Ladies Garment Workers (Bernhard-Altmann) v. NLRB*, 366 U.S. 731, 738 (1961) (employer violated 8(a)(2) by signing a memorandum of understanding recognizing the union as the exclusive bargaining representative when the union did not have majority status).

The Respondent, however, contends that it did not actually grant recognition to Local 348 on January 14. Rather, the Respondent contends that the January 14 contract between the parties was merely a "tentative" agreement that was conditioned on Local 348 obtaining majority support in the unit. The Respondent contends that it did not grant recognition to Local 348 or give binding effect to the contract until January 24, after the union had obtained sufficient additional membership applications from the previously unrepresented merchandisers to demonstrate majority support.

Unfortunately for Respondent, its position is not well supported by either the facts or the law. There is nothing in the contract indicating that the Respondent's recognition of Local 348 was conditioned on it obtaining majority support. Nor is there any provision stating that the contract itself was only "tentative" or would not become effective until Local 348 obtained majority status. On the contrary, the contract unambiguously and unconditionally granted recognition to Local 348 and provided that its terms were effective immediately, i.e., the same day that the contract was signed. (See GC Exh. 25, art. I) ("The Company agrees to recognize [Local 348] as the exclusive representative . . .), and art. XXX ("This agreement shall be in full force and effective from January 14, 2011 . . .").

In these circumstances, extrinsic evidence that the Respondent and Local 348 had a different oral agreement is barred by the parol evidence rule. See generally *Church Square Supermarket*, 356 NLRB No. 170, slip op. at 3–4 (2011), and cases cited there. See also *Price Crusher Food Warehouse*, 249 NLRB 433, 437–438 (1980). Although there is a recognized exception to the rule for conditions precedent that would prevent the contract from becoming effective, the exception is inapplicable if "the written contract addresses the subject matter of the condition precedent and the contractual terms are inconsistent with the condition precedent." *Beatley v. Knisley*, 183 Ohio App.3d 356, 362, 917 N.E.2d 280 (Ohio App. 2009). See also 11 *Williston on Contracts* § 33:18 (4th Ed.). As indicated above, the alleged oral condition precedent here—that recognition would not be granted or the contract effective until the Union demonstrated majority status—is plainly inconsistent with the contractual language. Accordingly, the exception is inapplicable and the extrinsic evidence may not be considered. See, e.g., *Vermont Investment Capital, Inc. v. Granite Mutual Insurance Co*., 705 F.Supp. 1019 (D. Vt. 1989), affd. mem. 888 F.2d 1377 (2d Cir. 1989) (parol evidence rule barred extrinsic evidence that insurance policy agreement covering property for sale, which was effective by its terms at a specific date and time, was not intended to be effective until the closing occurred); and *Aetna Insurance Co. v. Newton*, 274 F.Supp. 566, 572 (D. Del. 1967) (alleged oral agreement that parties' contract was not intended to take effect until certain insurance arrangements were completed was barred by the parol evidence rule, even without considering the contract's integration clause, inasmuch as the contract provided that it would run from the same date it was executed by the parties), affd. 456 F.2d 655, 657 (3d Cir. 1972).[21] See also *Lane Aviation Corp*., 218 NLRB

[21] There is no integration clause in the contract here. While it is not clear whether the appeals court in *Newton* agreed with all of the district

590 fn. 3 (1975) (Board declined to consider parol evidence that employee had orally agreed to obtain a valid driver's license as a condition precedent to reinstatement where the terms of the parties' written settlement agreement required immediate and unconditional reinstatement).

In arguing that the parties' alleged oral agreement should be considered, the Respondent does not specifically address the parol evidence rule or its exceptions. Nor do the cases it cites, none of which are apposite here. *Quebecor World*, 353 NLRB 1 (2008), review denied 572 F.3d 342 (7th Cir. 2009), and cases cited therein, hold that an *expiring* contract may be *extended* by oral agreement in the absence of a contractual prohibition on oral modifications. Such modifications are in the nature of a new independent oral contract, which have long been held binding and enforceable. See *Martinsville Nylon Employees Council Corp. v. NLRB*, 969 F.2d 1263, 1268 (D.C. Cir. 1992). *St. Vincent Hospital*, 320 NLRB 42, 44 (1995), is also clearly distinguishable. There, the Board gave effect to the parties' oral mid-term agreement to add an alternative health insurance plan because it was "consistent" with the terms of the contract, which expressly contemplated mid-term modifications and did not limit coverage to a single, exclusive plan. *Hiney Printing Co*, 262 NLRB 157, 165 (1982), and *Standard Oil Co.*, 137 NLRB 690 (1962), enfd. 322 F.2d 40 (6th Cir. 1963), also provide Respondent no help. They involved situations where the union refused to sign the contract until the condition precedent—employee ratification and/or international union approval—was satisfied. Finally, in *Beatrice/Hunt-Wesson, Inc*., 302 NLRB 224 (1991), the parties' alleged oral agreement to ratification as a condition precedent was memorialized in a separate memorandum of agreement executed by the parties the following day, which expressly stated that the negotiated contract was "tentative" and indicated that it would be submitted for "ratification as soon as possible."

In any event, even assuming arguendo that extrinsic evidence may properly be considered, it fails to establish the alleged oral agreement. Although the Respondent told Local 348 that the Union would need to demonstrate majority support, Local 348 clearly did not agree with this. Local 348 had expressed disagreement with the condition in the past (based on its position that the Akron contract transferred to Twinsburg), and, as indicated above, there is no evidence that it made any effort to obtain majority support prior to January 17. Further, when the Respondent reiterated the condition at the end of the day on January 14, Local 348 had already signed the contract. Moreover, Local 348 thereafter refused to sign the separate MOU drafted by Respondent expressly adding the condition.

In these circumstances, contrary to Respondent's contention, Local 348's agreement to the condition cannot be inferred simply because Local 348 did not subsequently voice any further objection when the Respondent repeated the condition while signing the contract. Agreement likewise cannot be inferred from Local 348's subsequent efforts to obtain membership/dues-checkoff forms from the former Maple Heights employees on January 17 and 19. Local 348 President Ziga credibly testified that the union would have done the same thing even if it already had a majority (Tr. 683–685, 710–711). Nor can it reasonably be inferred from Local 348's later failure to object to the Respondent's January 24, self-serving letter indicating that the contract was not effective prior to that date. As noted above (fn. 19), there is no evidence that any of Local 348's members suffered a loss of pay or benefits or other adverse consequences as a result of the Respondent's asserted failure to give binding effect to the contract until that time.

Accordingly, contrary to the Respondent, and in agreement with the General Counsel (and Locals 293 and 348), I find that the Respondent recognized and executed a binding collective-bargaining agreement with Local 348 on January 14.[22]

Local 348's Position

As indicated, Local 348 makes a different argument in support of the Respondent's actions. Local 348 argues that no showing of majority status was required at the new Twinsburg facility because the Respondent already had an existing collective-bargaining agreement with it at Akron. Local 348 argues that this position is supported both by Board precedent—specifically *Harte & Co*., 278 NLRB 947 (1986)—and by the provisions of the Akron contract.

Harte and similar cases,[23] however, are plainly distinguishable from the instant case. In those cases, the employer closed only one facility and the relocated employees were represented by only one union. The Board held that, in such circumstances, the employer was obligated to honor the extant contract and recognize the union as the exclusive representative of the employees at the new location, including any new hires, provided that the employer's operations remained substantially the same and a substantial percentage of the represented employees (approximately 40 percent or more) transferred to the new facility.

Here, in contrast, two facilities were closed, and employees from both of the closed facilities, who were represented by three different unions under three separate collective-bargaining agreements, were merged at the new facility. A substantial number of unrepresented employees at both of the

court's analysis, the analysis is persuasive. See *Galmish v. Cicchini*, 90 Ohio St.3d 22, 734 N.E.2d 782 (2000) ("The parol evidence rule applies, in the first instance, only to integrated writings, and an express stipulation to that effect adds nothing to the legal effect of the instrument"); accord: *Mcleod Addictive Disease Center, Inc. v. Wildata Systems Group*, Inc., 2010 WL 817165 (S.D. Ohio 2010).

[22] The General Counsel alternatively argues that, even if the January 14 contract was tentative or conditional, the Respondent's conduct nevertheless violated 8(a)(2), citing *Majestic Weaving Co.*, 147 NLRB 859 (1964) (finding that employer violated 8(a)(2) by negotiating with a minority union, notwithstanding that the union demonstrated majority status immediately before the employer signed the contract, where the union's majority was obtained with unlawful employer assistance), enf. denied on other grounds 355 F.2d 854 (2d Cir. 1966). The Respondent argues to the contrary, citing *Dana Corp*., 356 NLRB No. 49 (2010) (distinguishing *Majestic Weaving* and finding no 8(a)(2) violation where the employer entered into a letter of agreement that merely created a framework for future recognition and bargaining if the union obtained majority status). It is unnecessary to address these arguments in light of my finding that the contract was not tentative or conditional.

[23] See also *Westwood Import Co*., 251 NLRB 1213 (1980), enfd. 681 F.2d 664 (9th Cir. 1982); and *Rock Bottom Stores*, 312 NLRB 400 (1993), enfd. 51 F.3d 366 (2d Cir. 1995).

closed facilities also transferred to the new facility and were included in the negotiated unit.

As indicated by the General Counsel, in these circumstances the controlling precedent is not *Harte*, but *Metropolitan Teletronics*, 279 NLRB 957 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987). In that case, the Board reaffirmed the rule, previously set forth in *Boston Gas Co.,* 221 NLRB 628, 629 (1975), and *Martin Marietta Refractories Co.,* 270 NLRB 821, 822 (1984), that

> when an employer merges two separately represented work forces, the employer may not choose between the competing representational claims, unless one of the merged groups constitutes such a large proportion of the combined work force that there is no reason to question the continued majority status of that group's bargaining representative. [Id. at 960.]

Here, there is clearly reason to question Local 348's majority status at Twinsburg as of January 14. As indicated in the chart set forth above, only 38.7 percent (57 of 147) of the employees in the negotiated unit who began working the following Monday had previously been represented by Local 348 at Akron.[24] Of the remaining employees in the negotiated unit, 25 percent (37 of 147) were represented by Local 293 at Maple Heights; 9.5 percent (14 of 147) were represented by Local 1164 at Maple Heights; and 26.5 percent (39 of 147) were unrepresented at Akron or Maple Heights. Thus, the Local 348 employees from Akron did not constitute even 40 percent of the negotiated unit at the new facility.

Further, at no time did either Local 293 or Local 1164 disclaim interest, as the incumbent representatives at Maple Heights, in representing employees at the new facility. Although Local 293 presented a proposal on December 13, on behalf of all three locals, which designated Local 348 as the contract representative, the proposal was contingent on the sales/account managers being included in the unit (which is why the Respondent rejected it). Further, Local 293 subsequently advised Local 348 and the Respondent by telephone on January 12 and 13, respectively, that it was "going to continue to represent our people and . . . do what we have to legally." It also faxed a letter early the following morning on January 14 demanding continued recognition at Twinsburg as the representative of the transferred Maple Heights unit employees.[25] And when Local 348 informed Local 293 later the same morning that it would not honor its previous commitment to include the Maple Heights sales/account managers in any negotiated unit, both Local 293 and Local 1164 immediately refiled their internal union "jurisdictional" claims with the Joint Council.

Local 348's additional argument—that the "transfer of company title or interest" clause of the Akron contract required or justified the Respondent's actions—is also unsupported. No evidence whatsoever was offered regarding the bargaining history or prior application of that clause. Further, even assuming arguendo that the provision clearly and unambiguously covered the type of operational and unit changes that occurred here, which is doubtful (see fn. 8, above), it did not trump employee representational rights protected by the Act. See generally *Kroger Co*., 219 NLRB 388 (1975) (contractual "additional store" recognition clauses are valid only to the extent they may reasonably be read to require majority status at the additional store); accord: *Raley's*, 336 NLRB 374, 378 (2001); and *Alpha Beta Co*., 294 NLRB 228, 229 (1989). See also *Hotel Employees Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992). As discussed above, under the rule of *Metropolitan Teletronics*, the Act prohibited the Respondent in the instant circumstances from continuing to recognize Local 348 in the absence of majority status.

Accordingly, I find that the Respondent violated Section 8(a)(2) of the Act as alleged by granting recognition to, and executing a contract with, Local 348 on January 14.

3. The alleged 8(a)(2) assistance to Local 348 on January 17 and 19

The third violation alleged in the complaint is that the Respondent unlawfully gave Local 348's representatives access and permission to solicit authorization cards at the employee orientation meetings on January 17 and 19. I find that a preponderance of the evidence supports this allegation as well.

The Board considers the totality of the circumstances in evaluating whether an employer's conduct constitutes unlawful assistance. *Garner/Morrison, LLC*, 356 NLRB No. 163, slip op. at 7 (2011). Here, the totality of the circumstances clearly supports the General Counsel's position that the Respondent's conduct crossed the line. The employee meetings were scheduled by the Respondent on company time and all employees were required to attend. Further, as discussed above, the Respondent unlawfully granted recognition and executed a contract with Local 348 prior to the meetings. Moreover, Tecca, Respondent's area director, told the employees about the contract at the first meeting on the 17th. He also identified or introduced Local 348's principal officers at both meetings, and remained in the room on the 19th until several minutes after they passed out membership/dues-checkoff forms.

The Board in past cases has cited similar circumstances in finding that an employer's conduct would reasonably tend to coerce employees in the selection of their bargaining representative. See, e.g., *Garner/Morrison,* above; *Duane Reade, Inc*., 338 NLRB 943 (2003), enfd. mem. 99 Fed. Appx. 240 (D.C. Cir. 2004); *Price Crusher Food Warehouse*, 249 NLRB at 438; *Vernitron Electrical Components*, 221 NLRB 464, 465 (1975), enfd. 548 F.2d 24 (1st Cir. 1977), and additional cases cited therein.[26] Accordingly, I find that the Respondent's conduct violated Section 8(a)(2) of the Act as alleged.

[24] As discussed above, the record indicates that all 57 were members of Local 348, i.e., had signed membership applications at Akron. See GC Exh. 35; Tr. 484.

[25] Whether or not this letter stated a correct legal position, it clearly indicated that Local 293 was not abandoning its representational claims.

[26] Although the cited cases do not involve the identical circumstances, read together they leave little doubt that the Respondent's conduct here violated 8(a)(2), particularly in light of the Respondent's prior unlawful execution of the contract with Local 348, and despite the absence of any threats by the Respondent or request for equal access by Locals 293 and 1164.

4. The alleged 8(a)(2)/(3) deduction of Local 348 dues since February 1

The fourth and final alleged violation is that the Respondent has unlawfully deducted Local 348 dues from employee paychecks since February 1 pursuant to the union security provision in the January 14 contract. This allegation is likewise well supported. There is no dispute, and the record establishes, that the Respondent has been deducting the dues. Further, inasmuch as the January 14 contract was unlawful, it follows that the subsequent deduction of dues pursuant to the contract was also unlawful. See, e.g., *Safety Carrier, Inc*., 306 NLRB 960, 972 (1992); *Ned West, Inc*., 276 NLRB 32, 44 (1985); and *Monfort of Colorado, Inc*., 256 NLRB 612, 614 (1981), enfd. sub nom. *National Maritime Union v. NLRB*, 683 F.2d 305 (9th Cir. 1982). Accordingly, I find that the Respondent violated Section 8(a)(2) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. By granting recognition to, and entering into a contract with, Local 348 as the exclusive collective-bargaining representative of the employees in the following unit at its new Twinsburg facility on January 14, and by thereafter granting Local 348 access and permission to solicit membership/dues-checkoff forms from the employees on January 17 and 19, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(2) and (1) and Section 2(6) and (7) of the Act:

> [A]ll delivery drivers, warehousemen, vending, mechanics, merchandisers, equipment move operators, service technicians, transport drivers and seasonal employees working directly out of the Twinsburg, Ohio facility, excluding all other employees, office clerical employees, guards, professional employees, sales employees and supervisors as defined in the National Labor Relations Act.

2. By deducting Local 348 dues from employees in the above unit since February 1 pursuant to the union-security provisions of the January 14 contract, the Respondent has also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(2), (3), and (1) and Section 2(6) and (7) of the Act.

3. The Respondent did not threaten employees on January 11 in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent engaged in the above unfair labor practices, I shall order it to cease and desist from such conduct and to take certain affirmative action to effectuate the purposes and policies of the Act. Specifically, I shall order the Respondent to withdraw and withhold recognition from Local 348 as the exclusive collective-bargaining representative of any of its Twinsburg employees unless and until the Board has certified it as such representative. In addition, I shall order the Respondent to reimburse all present and former Twinsburg employees for any and all initiation fees, dues, assessments, or other moneys paid by or withheld from them pursuant to the terms of the January 14 collective-bargaining agreement with Local 348, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I shall also order the Respondent to post a notice to all employees in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010). See, e.g., *Duane Reade* and *Safety Carrier*, above.

The General Counsel's complaint and posthearing brief also request certain additional remedies. Specifically, the General Counsel requests that I order the Respondent to: (1) read the notice to employees or allow a Board agent to do so in the Respondent's presence; and (2) provide Locals 293 and 1164 with (a) the names and addresses of the current employees on request; (b) reasonable access to bulletin boards and nonwork areas during nonwork time; and (c) equal time and facilities to respond to any address the Respondent makes to employees regarding union representation. However, I find that the General Counsel has failed to present any persuasive reasons or authority to support issuing such remedies in the circumstances of this case.

With respect to the first (notice-reading) remedy, the General Counsel's brief asserts that this remedy is necessary in light of the pending representation petition filed by Locals 293 and 1164 on February 24 (see fn. 20, supra). However, it is not clear why this is so, and the General Counsel's brief does not offer any explanation. Further, the only supporting case cited by the General Counsel (*Federated Logistics*, 340 NLRB 255, 258 fn. 11 (2003), review denied 400 F.3d 920 (D.C. Cir. 2005)) involved numerous 8(a)(1) and (3) violations during an initial organizing campaign, i.e., it has nothing in common with the facts and circumstances here.

As for the second (access and address) remedy, the General Counsel's brief asserts that this remedy is necessary to counterbalance the access that Local 348 has enjoyed as the unlawfully recognized exclusive representative since January 14. However, again, it is not clear why this is so, particularly since many of the employees who transferred to Twinsburg on January 17 were longtime members of Locals 293 and 1164. There is no record evidence that these employees have abandoned their support for Locals 293 and 1164, or that there has been any significant employee turnover, in the 7 months since. Nor has the General Counsel offered any other reasons why such a remedy is warranted in this proceeding.[27] Again, the only supporting case cited (*John Singer*, 197 NLRB 88 (1972)), is clearly distinguishable. That case involved an employer's refusal to bargain with the employees' certified bargaining representative.

I therefore deny the General Counsel's request and find that the Board's standard remedies are sufficient.[28]

[27] The locals would normally be entitled to receive a list of the employees' names and addresses in the representation proceeding. See *National Carloading Corp*., 167 NLRB 801, 804 fn. 27 (1967); and *Excelsior Underwear*, 156 NLRB 1236 (1966).

[28] The record indicates that the merchandisers work 95 percent of the time in the field and do not come into the facility as regularly or frequently as other employees. See Tr. at 334, 454, 490, and 587. Indeed, as discussed previously, this is one of the reasons the Respondent normally schedules separate meetings with the merchandisers. Thus, it might reasonably be argued that the notice should be posted for more than the usual 60 days and/or mailed to the merchandisers. See, e.g.,

Accordingly, on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Respondent, The American Bottling Company, Inc. d/b/a Dr. Pepper Snapple Group, Twinsburg, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Giving unlawful assistance to Teamsters Local Union No. 348 a/w The International Brotherhood of Teamsters, or any other labor organization.

(b) Granting exclusive recognition to, and entering into a collective-bargaining agreement with, Teamsters Local 348 or any other labor organization without evidence of majority support.

(c) Maintaining and enforcing the collective-bargaining agreement it executed with Teamsters Local 348 on January 14, 2011, or any extension, renewal, or modification thereof or supplement thereto; provided that nothing herein shall authorize or require the Respondent to discontinue or modify any of the employees' current wages, benefits, or other substantive terms of employment established thereunder.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold recognition from Teamsters Local 348 as the exclusive collective-bargaining representative of any of the employees at the Twinsburg facility unless and until the Board has certified it as such representative.

(b) Reimburse all former and present employees employed at its Twinsburg facility for all initiation fees, dues, assessments, or other moneys paid by or withheld from them since February 1, 2011 pursuant to the collective-bargaining agreement it executed with Teamsters Local 348 on January 14, 2011, plus interest in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Twinsburg, Ohio, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Region, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 14, 2011.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 12, 2011

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT give unlawful assistance to Teamsters Local Union No. 348 a/w The International Brotherhood of Teamsters, or any other union.

WE WILL NOT grant exclusive recognition to, or execute a collective-bargaining agreement with, Teamsters Local 348, or any other union without evidence of majority support.

WE WILL NOT maintain and enforce the collective-bargaining agreement we executed with Teamsters Local 348 on January 14, 2011, or any extension, renewal, or modification thereof or supplement thereto; provided that nothing herein shall authorize

California Gas Transport, Inc., 347 NLRB 1314, 1362 fn. 64 (2006), enfd. 507 F.3d 847 (5th Cir. 2007); *Technology Services Solutions*, 334 NLRB 116 (2001); and *NCR Corp*., 313 NLRB 574, 577 (1993). However, no party has made this argument to date.

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

or require us to discontinue or modify any of your current wages, benefits, or other substantive terms of employment established thereunder.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold recognition from Teamsters Local 348 as your exclusive collective-bargaining representative unless and until it has been certified as such by the Board.

WE WILL reimburse you for all initiation fees, dues, assessments or other moneys paid by or withheld from you since February 1, 2011 pursuant to the collective-bargaining agreement we executed with Teamsters Local 348 on January 14, 2011, plus interest.

THE AMERICAN BOTTLING COMPANY, INC. D/B/A DR. PEPPER SNAPPLE GROUP